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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 164

MORRY LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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With some differences which we discuss below, this case is a carbon copy of *Brown v. United States*, 359 U.S. 41, No. 4, O.T. 1958, decided March 9, 1959. It arose out of the same grand jury investigation (R. 7; Brown R. 6-7) and involves the same judge (Levet, D.J.) and counsel on both sides (R. 7; Brown R. 6). The proceedings which culminated in the petitioner's conviction of contempt occurred just two weeks after Brown's conviction (R. 7, 26, 54; Brown R. 6, 34, 47, 49). The commands of the subpoenas issued to Brown and the petitioner were identical (R. 19; Brown R. 19). The same six questions were put to the two witnesses in identical language. It appears from these questions that Brown and the peti-

tioner were associated in the same businesses. (R. 20, 23-25; Brown R. 19-23.) Obviously, therefore, the grand jury sought from the petitioner the same information Brown had refused to give on his appearances before it. As in Brown's case, the petitioner had previously appeared before other grand juries investigating other matters and he, like Brown, according to their counsel, had been told in the course of those other proceedings that he was to be indicted for violating the "internal revenue laws" (R. 10, 32; Brown R. 28; see Pet. 4).

The procedure in the district court in this case followed the procedure in the *Brown* case (compare Pet. 4-11 with 359 U.S. at 42-44). The petitioner, however, was sentenced to imprisonment for one year (R. 54), whereas Brown's sentence was 15 months (359 U.S. at 52).

Despite the petitioner's plea (Pet. 18-27) that this Court reconsider and overrule that part of the *Brown* decision which sanctioned the summary procedure under Rule 42(a) of the Federal Rules of Criminal Procedure invoked in the district court, and his further plea (Pet. 27-28) that the sentence constituted an abuse of discretion and cruel and unusual punishment, we, like the court of appeals (see Pet. App. 30), see no occasion for a re-examination of these issues so recently decided.<sup>1</sup>

<sup>1</sup> In his plea for reconsideration of the first of these questions, the petitioner argues (Pet. 18-23) that the *Brown* decision is inconsistent with *Clark v. United States*, 289 U.S. 1, 19, in that it revived the doctrine of "purgation by oath" which the *Clark* decision renounced. But there is a vast difference between the discarded notion that the oath of a contemnor denying mis-

The petitioner also contends that his case involves issues which were not decided in *Brown*. He claims that he was denied compulsory process to require the production of evidence and the attendance of witnesses (Pet. 16-18) and that the proceedings in the district court violated due process and the Sixth Amendment's guarantee of a public trial because they were conducted in "secrecy" (Pet. 11-16).

We think the first contention presents nothing new. In the *Brown* case counsel sought, on both of Brown's appearances before the court, "a reasonable adjournment and a notice from the Government of the specifications or charges for which we are having this hearing so that we can prepare for this hearing and

conduct is a conclusive defense to a charge of contempt (see *United States v. Shipp*, 203 U.S. 563, 574) and the situation in *Brown*, and here, where the court foregoes proceeding against a witness under Rule 42(b) for his contempt before the grand jury, but outside of the actual presence of the court, and elects instead to make another effort to induce him to testify before the court with the grand jury present. As this Court explained, such procedure affords the witness "*a locus penitentiae*" (359 U.S. at 52)—an opportunity to purge himself of contempt (not the same thing as "purgation by oath")—before he is finally adjudicated in contempt.

The petitioner also argues (Pet. 23-27) that in holding that Brown's final refusal to answer the questions "left the [district] court no choice" but to adjudicate him in contempt (359 U.S. at 51), this Court "overlooked" the district court's power to commit him for civil contempt until he complied with the court's order. Apart from the unworthiness of this argument, especially in the light of the cases this Court cited (some of which, as the petitioner points out, were instances of the use of the coercive power and therefore, in his view, do not support the Court's conclusion), the short answer to it is that it is not for the witness to dictate which, among the remedies available, the court shall choose to deal with his recalcitrance.

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be able to properly represent our client" (Brown R. 9; see also *id.*, 10, 35, 37 and 46). In this case counsel refined his requests in this respect (R. 9, 37, 40) by adding that he wished to subpoena (1) "all the Grand Jury minutes of this investigation so that we can determine \* \* \* whether this is in reality an investigation under the Motor Carriers' Act"; (2) "the Interstate Commerce Commission and the Justice Department" to the same end; and (3) the "minutes of the other Grand Juries before which this witness has appeared \* \* \* so that it can be determined by the Court after examination of the minutes whether the immunity purported to be granted here is co-extensive with the privilege" (R. 9-10; see also R. 40).<sup>\*</sup> The district court denied these requests on the ground of irrelevancy, ruling, as it had in the *Brown* case (Brown R. 34), that the proceeding involved no question of fact but only the legal issue whether the witness was protected by the immunity statute (R. 10, 11, 16, 26, 27, 35, 40, 42-43).

In the light of the *Brown* decision, these ancillary requests for process were properly denied. This Court there confirmed the district court's view that the proceeding involved no factual issue on which it was necessary to hear evidence. 359 U.S. at 48.

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<sup>\*</sup>In *Brown*, too, counsel argued in support of his motion for an adjournment that he wished to look into the question whether he could "compel the production of the grand jury minutes of prior investigations to ascertain the purpose of this investigation" (Brown R. 11). He also raised a question whether "this investigation was directed by the Interstate Commerce Commission [or] by the Attorney General" (*id.*, 30).

Furthermore, as the courts below rightly held (R. 16; Pet. App. 30-31), a witness before a grand jury has no right to probe into the purposes of its investigation or to challenge the motives of the jury or government counsel. *United States v. Johnson*, 319 U.S. 503, 513.

With respect to the petitioner's complaint of "secrecy", it is to be noted that, as in the *Brown* case (see 359 U.S. at 51, fn. 11), this question was raised for the first time in the court of appeals. It is true that the Court pretermitted this question in *Brown* because the record did not show that the proceeding was conducted in "secrecy" (*ibid.*), and that the record here does show that on the petitioner's second appearance before the court with the grand jury on April 22, 1957, at which time he persisted in his refusal to answer the questions and was adjudicated in contempt, the courtroom was "cleared" after the court explained, "Will those who have no other business in the courtroom please leave now? I have a Grand Jury proceeding" (R. 36-37). The petitioner made no objection.<sup>3</sup>

<sup>3</sup> It does not appear that the courtroom was cleared on the petitioner's first appearance before the court on April 18, 1957, when the grand jury asked the aid of the court in directing the petitioner to answer the grand jury's questions (compare Pet. 6 with R. 7 and R. 36). In any event, the petitioner would have no standing to complain if the courtroom was in fact cleared, because the proceedings on that day, which culminated only in a direction that the petitioner appear before the grand jury on April 22 and answer the questions (R. 25-36), could in no sense be considered a contempt proceeding. The contempt did not occur until April 22. See *Brown v. United States*, 359 U.S. at 49-50.

On this point, we reiterate the argument we made in our brief in the *Brown* case (pp. 48-50) that the petitioner cannot object to such procedure for the first time in an appellate court.\* To the extent that the district court was continuing the grand jury inquiry on April 22, 1967, i.e., asking the questions which the petitioner had previously been asked in the grand jury room, the closing of the courtroom would seem appropriate and consistent with the usual mode in which a grand jury operates. It should not be legally significant, in this regard, whether the court physically goes to the grand jury room or the grand jurors go to a courtroom from which the public is absent. The only respect in which the procedure here differed from that which might have prevailed had the court gone to the grand jury room is that the petitioner's counsel and some court attendants were present when the questions were put to the petitioner by the court.\* But the petitioner can hardly object to

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\*The court of appeals, after dealing with the petitioner's contention that he was denied compulsory process, said that "He raises no other points of merit" (Pet. App. 30-31). On Brown's appeal, the court of appeals, apparently assuming that the courtroom was closed at the time Brown was adjudicated in contempt as it was on his earlier appearance before the district court, noted the presence of Brown's counsel and his failure to object to the clearing of the courtroom and held that Brown could not then complain of such procedure. 247 F. 2d 329, 330.

\*It is to be noted that, when the court called the petitioner to the stand on April 22 to answer before the court and the grand jury the questions he had twice previously refused to answer in the grand jury room, the petitioner's counsel asked whether "this [is] the Grand Jury proceeding, or is this a contempt proceeding?" The court replied, "The Court and the

the presence of his counsel; his complaint is that the proceedings were too secret, not too public. And, in any event, the petitioner stated that he would persist in his refusal to answer the questions were he to return to the grand jury room (R. 50-51).

Here, unlike the situation of a contempt committed before a judge sitting as a one-man grand jury in secret session (cf. *In re Murchison*, 349 U.S. 133; *In re Oliver*, 333 U.S. 257)\*, the petitioner's contempt in the presence of the court was committed in recorded proceedings at a time when he was represented by counsel. Up to this point the proceeding was essentially designed to afford the petitioner a further opportunity to comply with the court's direction that he answer the questions before the court faced the neces-

Grand Jury." When counsel reiterated his request that "we proceed in accordance with Rule 42(b)", the court replied, "We are proceeding in accordance with Rule 42(a)." (R. 47.) This latter comment must necessarily be read to mean that the court *would* proceed under Rule 42(a) if the petitioner were to persist in his disobedience of the court's directions to answer the questions.

\*On this point, the petitioner, like Brown (see Petitioner's Brief in No. 4, O.T. 1958, pp. 27-28, 30-31), relies principally on the *Oliver* decision. But surely the recorded adversary proceedings before the district court, in which the petitioner was capably and vigorously represented by counsel every step of the way, cannot be labeled "secret" in the sense of that word as it is used in the *Oliver* case, where the entire proceeding, from the time Oliver testified to the time the judge-grand jury summarily sentenced him for contempt for giving what the judge believed (on the basis of prior secret testimony given by another witness in Oliver's absence) was false and evasive testimony, was conducted in secrecy, with no opportunity for Oliver even to consult counsel.

sity of adjudicating him in contempt. *Brown v. United States*, 359 U.S. at 50, 51-52.

If the petitioner ever had a right to have the courtroom reopened to persons in addition to his counsel, that right could only have arisen after it finally became apparent on April 22 that, by virtue of his persistent refusal to testify, the inquiring function of the grand jury was thwarted and all that remained was the adjudication of contempt by the court. The petitioner not only failed to assert any such right, but he cannot in any manner, real or hypothetical, demonstrate that he was prejudiced by the procedures that followed. All that took place after the court stated that it would "listen to any reason why I should not so adjudicate [his witness in contempt]", as requested by counsel for the government after the petitioner's final refusal in the presence of the court and the grand jury to answer the questions (R. 51), was the reiteration by the petitioner's counsel of his contentions that the immunity provision did not extend to the petitioner and that the proceeding was not in accordance with Rule 42(b), and the court's adherence to its prior rulings (R. 51-53). The adjudication of contempt (R. 53) and the sentence thereafter imposed (R. 54), of course, immediately became matters of public record and there was no attempt on the part of the court or counsel for the government to conceal the proceedings. Since the courtroom session on April 22 was essentially a continuation of the grand jury's meeting and, as we have said, was therefore properly conducted in the absence of the general public, there was certainly no defect in the proceeding up to

that point. In these circumstances, and especially in the absence of any objection on this score, the petitioner was not prejudiced simply because the court did not then dissolve the closed session with the grand jury, *que* grand jury, and announce that the courtroom was open for the purpose of making the formal adjudication, which had clearly been forehad-owed (see footnote 5, pp. 6-7, *supra*), on the petitioner's refusal to obey the court's order in the closed session to answer the grand jury's questions. The petitioner would have been entitled to no more than this if he had objected to the clearing of the courtroom. Accordingly, if the procedure was defective, we submit that, at most, the petitioner would be entitled to a remand of the case to the district court for resentencing. But, as the court of appeals held in the *Brown* case, 247 F. 2d 332, 338-339, we think that even within this narrow compass, the petitioner's objection came too late.

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1960.